United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

74-1083

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

LENIN ENCISO-CARDOZO, EDWIN
MICHAEL ENCISO, Minor

Docket #74-1083

Petitioners

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

- X

PETITIONERS' REPLY BRIEF

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POINT I

THE AUTHORITIES CITED BY RESPONDENT DO NOT STAND FOR THE PROPOSITION CLAIMED IN CONTEXT OF THE INSTANT CASE.

As authority for the proposition that the courts have consistently rejected the argument that a citizen spouse or citizen child should be permitted to intervene in deportation proceedings against alien relatives, respondent cites

Agosto v. Boyd, 443 F.2d 917 (9th Cir.1971); Swartz v. Rogers, 254 F.2d 338 (D.C. Cir.1958); Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970); Application of Amoury, 307 F.Supp.213 (S.D. N.Y. 1969). These cases are correctly cited only for those situations where the plea of the alien or his relatives depends on an asserted right to substantive due process sufficient to justify a challenge to the power of Congress to determine which aliens shall be permitted to enter and remain in the United States; and have sought on the basis of the alien's relationship to a United States citizen to create a status or standing otherwise prohibited by statute.

a) In Agosto v. Boyd, supra, the District Court had dismissed a complaint by wife and children seeking an order permitting them to intervene in deportation proceedings against the alien husband-father. The Court of Appeals, per curiam, affirmed the decision on the grounds that the District Court had no jurisdiction, and that the Court could discover no basis for conferring standing upon the relatives to intervene. The District Court decision is unpublished. The Court of Appeals decision does not recite enough facts, including for example, whether the relatives are citizens, to

permit a determination as to the relevancy of this case to the instant case.

b) In Swartz v. Rogers, supra, an alien, who had previously been convicted for a violation of the Narcotics Act, and his naturalized wife, asserted that the husband could not be deported because their marriage created a contract right or status which was protected by due process requirements against its destruction by the deportation of the husband. Acknowledgement of such status would have been contrary to that section of the Immigration and Nationality Act which provides specifically for the deportation of narcotics offenders, Section 241(a)(11). Furthermore, Section 241(b)(2), which provides for relief from deportation in some instances for aliens convicted of crimes, specifically excludes from its provisions aliens deportable under Section 241(a)(11). The Court stated that " under these circumstances we think the wife has no constitutional right which is violated by the deportation of her husband ". (Emphasis added).

c) In Silverman v. Rogers, supra, the alien

had in 1964 entered the United States on an exchange-visitor visa, for training for service in her country. A contractual condition of this visa was that the alien would return to her country for two years before being permitted to return to the United States. The alien and her United States citizen husband asserted that to refuse the alien the right to reside in the United States would destroy their marriage and deprive both the alien and her husband of their constitutional rights. The Secretary of State had recommended that the waiver of the foreign residence requirement, for which the alien had applied, not be granted. The alien and her husband sought a judgment directing the Secretary to issue the waiver. The Court upheld the Secretary's statutory authority to exercise the waiver, and noted, supra, 437, F.2d at 107 " In the instant case at least one and presumably both of the parties were well aware before their marriage that ...(the alien) had agreed to return to Turkey. Under these circumstances we see nothing unfair in permitting the government to carry out its policies." (Emphasis added).

d) In Application of Amoury, supra, the alien parents sought to avoid the statutory provision that

as to parents of United States citizens, the citizen must be over twenty-one years in order to confer upon the parent eligibility for an immigrant visa. Immigration and Nationality Act, Section 201(b). The provision was attacked as an arbitrary classification as between American citizens under and over the age of twenty-one years. The Court rejected the argument.

Contrary to the situations presented in the cases above, the petitioners in the instant case do not seek, in the fact of a prohibitory statute, the creation of a preferential status. On the contrary, their eligibility to permanent residence is clearly established by Sections 212(a)(14) of the Immigration and Nationality Act, which provides as to Western Hemisphere parents of the United States citizens an exception to the requirement of Section 201(b) that the citizen child must be over twenty-one years in order to confer on his parents eligibility for a permanent visa. The government seeks to deport the Enciso parents, not because their eligibility for permanent residence is prohibited by statute, but because their chronological place on the visa waiting list has not yet been

reached.

Respondent's labeling of petitioners' approach as "novel" is misapplied if it is meant to suggest that the issue here is not fundamentally distinguishable from the issue presented in the cases cited above. The Enciso case presents for the first time in the proper context of a deportation hearing the question whether, given the independently established eligibility for permanent resident status of his parents, the infant citizen has sufficient interest in the support and protection of his parents, in the United States, to have that interest specifically considered and weighed during the determination of when the government should exercise its power to deport his parents. We submit that the interest is sufficiently important to be considered, as such.

POINT II

THE DEPORTATION HEARING IS THE PROPER FORUM TO PROTECT THE RIGHTS OF THE CITIZEN CHILD.

Respondent points out that the Amoury case states that the child was not the subject of the deportation

proceedings and was not entitled to notice and hearing with respect to the alleged deportability of the parents. Petitioners agree. Petitioners do not seek hearing with respect to the claim that the parents had remained in the United States beyond the time permitted upon their entry. The infant citizen is, however, as the infant in Amoury was found to be, " aggrieved by agency action ", "sufficiently so to be entitled to judicial review thereof." (Amoury, 307 F.Supp. at page 215). If he is entitled to judicial review, he should be entitled to appear in the proceedings below. (See American Communications Association v. United States, 298 F.2d 648 (2nd Cir.1962).

Furthermore, infant petitioner claims that he has a right to be supported and protected by his parents in the country of which he is a citizen, and that this interest is sufficiently significant so that it should not be destroyed without granting him an opportunity to be heard to have that specific interest weighed and considered. This opportunity should be granted by the administrative agency entrusted with the administration of the statute and accustomed through the exercise of its discretionary power to the balancing and weighing of equitable and sometimes

conflicting factors.

The interests of judicial economy dictate that the alternative, declaratory judgment in the District Court, is not to be preferred. But surely the interest must be accorded one forum or the other.

POINT III

THE INTEREST OF THE PETITIONER IS AS SIGNIFICANT AS OTHER INTERESTS WHICH, EVEN IN THE ABSENCE OF STATUTORY MANDATES, HAVE BEEN HELD TO CREATE IN THE ADMINISTRATIVE AGENCY AN OBLIGATION TO GIVE NOTICE AND HEARING TO PRESENT THAT INTEREST.

This obligation, in the administrative agency, has been found to exist, for reasons of satisfying constitutional due process or the requirements of fair play and equitable procedure, in the context of a variety of third party interests.

Thus, for example, even where the National Labor Relations Board did not provide for making independent unions parties to proceedings during which their contracts with employees were invalidated, it was decided that the unions, " having valuable and beneficial interests in the

contracts", were entitled to notice and hearing before the contracts could be set aside. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 83 L.Ed. 126, 59 S.Ct. 206 (1938).

In so doing, the court cited cases in equity and stated that the rule applied in those cases was equally applicable to this situation, and that the rule " is not of a technical character but rests upon the plainest principle of justice". (305 U.S.233, 83 L.Ed.142,59 S.Ct.218).

Likewise, in a situation where the Secretary of War, who was authorized to fix all tolls charged on bridges, exercised this authority as to a certain bridge company, a competing company successfully maintained that reduction of its competitor's tolls, without considering the effect on its own bridge and without giving it notice and opportunity to be heard, vitiated the action. Clarksburg-Columbus Short Route Bridge Co. v. Woodring, 89 F.2d 788 (App.D.C. 1937). The Court observed (67 App.D.C. 46,89 F.2d 790) that " It is not important that in this instance a hearing is not expressly enjoined by the statute.The right is constitutional and the deprivation of the citizen of his property without notice

and an opportunity to be heard amounts to the taking of his property without due process of law (Constitutional Amendment 5)".

In a similar situation, in Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936) an order of the Secretary of Agriculture, fixing maximum rates to be charged by market agencies in buying and selling livestock, was set aside by a company which was a competitor of the company whose rates were involved. The court said that ". . . considering the sharp competitive conditions existing between the two companies here involved, it was impossible for the Secretary to arrive at a decision. . . in the absence of complete and full testimony as to all the conditions bearing upon the rights of these respective parties". The court pointed out that the Secretary is vested " with most drastic power" and that this " in and of itself imposes the necessary requirements for the protection of the rights of all interested parties".

Again, it was held that a third party employee whose seniority rights may be altered to his detriment by an award of the National Labor Relations Board, acting under the

Railway Labor Act, must be accorded notice and a hearing, even though the statute does not require that he be a party to the proceedings relating to the contract under which he acquired the rights. It cannot be considered that an infant citizen is any less "bound" by the decision relating to the deportation of his parents than an employee is bound by an order in which he may be deprived of seniority and therefore precluded from continuing employment. See Nord v. Griffen, 86 F. 2d 481 (7th Cir. 1936).

An infant citizen is no less "involved" in the deportation proceedings of his parents than a Railroad porter is in a dispute over an order of a Railroad Adjustment Board which awarded to brakemen the duties the porters had been performing. Such order was held to deprive the parties of their constitutional right and was void for want of notice and hearing. Hunter et al v. Atchison, T.& S.F. Ry.Co., 171 F.2d 594 (7th Cir. 1948).

In Journal Co. v. Federal Radio Commission, 48 Fed.461 (C.A.D.C. 1931) the Court was of the opinion that although the action complained of by appellant (shifting and increasing power of a competing station on same

frequency) was clearly subject to regulation (as is determining the conditions under which alien parent may stay in the United States), it was not only in the interest of the public but also in the interest of " common justice to the owner of the (appellant) station" that its status should not be injuriously affected except for compelling reasons. The Court noted, supra,(at page 464) that the Commission was better equipped than the Court to work out an equitable solution. The decision of the lower court was reversed with directions to afford the appellant after notice and opportunity to be heard, such relief as would provide an equitable solution.

The interest of a radio station in the regulation of his competitor's transmission is not a more significant interest than that of the United States in the welfare of its citizens and of the infant citizen in staying in the United States under the protection and support of his parents.

CONCLUSION

For the reasons stated in Petitioners' brief in

support of the petition for review and in the reply brief herein, the case should be remanded to the Immigration Judge with instructions to grant the motion to intervene and for further proceedings in consideration thereof.

September 12, 1974

Respectfully submitted,

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